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No. 82-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,

Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

By enacting Section 1403 of the Federal Aviation Act, 49 U.S.C. Section 1403 (1981), requiring the recordation of conveyances affecting aircraft, did Congress preempt state law insofar as state law would permit the conveyance of title to aircraft by transfer of possession alone, without FAA recording?

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[1] Philko Aviation, Inc., the Petitioner herein, is a wholly owned subsidiary of McArdle, Ltd., a Delaware Corporation. Philko Aviation, Inc. has no subsidiaries. McArdle, Ltd. has the following wholly owned subsidiaries in addition to Philko Aviation, Inc.: Airport Farms, Inc.; American Lodging Corp.; Big Flamingo II, Inc.; Bonhomme Richard, Ltd.; Burr Hill Country Club Inc.; Burr Hill Properties, Ltd.; Forty-Six East Oak, Ltd; Pheasant Run, Inc.; Rockton Productions, Inc.; Smith Road Properties, Inc.; Spanish Lakes, Inc. and Wilson World Travel, Inc.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, 1a-13a) is reported at 681 F.2d 506 (7th Cir. 1982). The order and opinion of the District Court (Pet. App. B, C and D, 14a-40a) is reported at 497 F. Supp. 1262 (N.D. Ill. 1980).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A, 1a-13a) was entered on June 22, 1982. The Petition for Certiorari was filed on August 20, 1982 and was granted on December 6, 1982. The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI;
49 U.S.C. Sec. 1401 (1981);
49 U.S.C. Sec. 1403 (1981);
49 U.S.C. Sec. 1406 (1981);
Ill. Rev. Stat. Ch. 26, Sec. 2-401 (1978);
Ill. Rev. Stat. Ch. 26, Sec. 2-403 (1978).

The full text of these constitutional and statutory provisions are included in the Appendix to this Brief.

STATEMENT OF THE CASE

Background of the Philko Transaction

The Petitioner Philko Aviation, Inc. (Philko) owns the fixed base hangar and office facilities at the Aurora Municipal Airport, in Aurora, Illinois. (R. AA Dep. 31-34)[1] Philko's president is Edward J. McArdle. (McArdle) (R. EM Dep. 4) Philko is a subsidiary of McArdle, Ltd., a corporation engaged primarily in the recreational and leisure time business. One of its principal subsidiaries is Pheasant Run, Inc. in St. Charles, Illinois. McArdle, Ltd. utilizes aircraft in conducting its business. (R. AA Dep. 9-23)

In early 1977, McArdle met Roger Smith (Smith) while inspecting aircraft to replace an existing business aircraft. At that time, Smith operated Roger Smith Aircraft

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[1] Petitioner in its brief shall refer to the following depositions all of which have been filed as part of the record in this case in the manner indicated below:

Deposition of Anastasios Agnos taken July 18, 1979	R. AA Dep.
Continued deposition of Anastasios Agnos taken October 23, 1979	R. AA-2 Dep.
Deposition of Richard Andrews taken October 4, 1979	R. RA Dep.
Deposition of Jack Hamburg taken July 12, 1979	R. JH Dep.
Deposition of Edward J. McArdle taken October 30, 1979	R. EM Dep.
Deposition of Maurice Shacket taken July 12, 1979	R. MS Dep.
Continued deposition of Maurice Shacket taken July 13, 1979	R. MS-2 Dep.
Deposition of Sylvia Shacket taken July 12, 1979	R. SS Dep.

Sales Inc. (Smith, Inc.), an aircraft dealership located at the Du Page County Airport, Du Page County, Illinois. Smith told McArdle in the spring of 1977 that the Aurora Municipal Airport facility in Aurora, Illinois was for sale. Because Smith himself could not afford to buy the Aurora facility, he wanted to find someone who would purchase the facility and lease it back to him. (R. EM Dep. 12-21) McArdle decided to buy the Aurora facility which was near Pheasant Run in order to provide a convenient location to store McArdle, Ltd.'s corporate aircraft and to be an economical source for fuel and oil for these aircraft. (R. EM Dep. 17, 23-24) Philko Aviation, Inc. was incorporated in 1977 to acquire the Aurora facility. In acquiring the Aurora facility, Philko was required to buy the seller's inventory of aircraft, approximately ten airplanes. Philko then leased the facility to Smith, Inc. (R. EM Dep. 24) Under the lease, Smith, Inc. was to sell aviation fuel and lubricants, operate a flight school, and liquidate Philko's existing aircraft. These activities were to be done in Philko's name. (R. AA Dep. 53-56; R. EM Dep. 39) Smith, Inc. was also allowed to and did conduct a used aircraft dealership in its own name at the Aurora airport. (R. AA Dep. Ex. 7-7a)

After Philko and Smith, Inc. entered into their lease, Smith persuaded McArdle to guaranty a portion of a secured line of credit for Smith, Inc. Philko guaranteed $100,000 of Smith, Inc.'s $500,000 secured line of credit at Commercial Credit Equipment Corporation. (R. EM Dep. 27) Philko did this to help insure that Smith, Inc. was profitable and could make its lease payments. Philko was not separately compensated by Smith, Inc. for giving this guaranty. (R. EM Dep. 28-29)

In December of 1977, Pheasant Run, Inc., one of McArdle, Ltd.'s subsidiaries, loaned Smith, Inc. $80,000 at 9%

interest due June 19, 1978 so Smith, Inc. could discharge an existing bank loan which had come due. This loan to Smith, Inc. was secured by the personal, collateralized guaranties of Mr. and Mrs. Smith. Between December, 1977 and April, 1978 Smith, Inc. reduced the principal balance of this loan to $60,000. (R. AA Dep. 91)

Background of the Shackets' Transaction

Maurice and Sylvia Shacket are the owners and officers of Crown Heating and Manufacturing, a Michigan corporation. They are also owners or part owners of Troy Mobile Homes and have ownership interests in and manage other trailer home parks. (R. MS Dep. 6-8; SS Dep. 7-8) Shacket has been a pilot for some 35 years, holding multiple licenses issued by the Federal Aviation Administration. (R. MS Dep. 6-8)

From approximately 1959 through 1975 Shacket had purchased and traded six aircraft. Shacket knew that the FAA maintained at Oklahoma City, Oklahoma a central registry for registering titles to aircraft. (R. MS-2 Dep. 26-27) Each time Shacket had purchased an aircraft he received notification from the FAA that the bill of sale had been recorded and title to the aircraft had been duly registered with the FAA facility at Oklahoma City, Oklahoma. (R. MS Dep. 6-19; MS-2 Dep. 26-27) In 1972 or 1973 Shacket purchased a Piper Aztec from Smith, Inc. After this purchase he personally applied to the FAA to change the registration number on the Piper Aztec. In 1975 Shacket traded his 1972 Piper Aztec for a 1972 Piper Navajo owned by a Florida resident. This transaction occurred in Charlotte, North Carolina. To complete this transaction Shacket personally prepared the bill of sale and registration forms issued by the FAA to effect the transfer of title to his aircraft. (R. MS Dep. 19-22)

The Dual Transactions Involving The New 1978 Piper Navajo Aircraft

Sometime prior to November, 1977 Smith, Inc. sent Shacket its advertising flyer listing certain used aircraft for sale. Shacket contacted Smith, Inc. in 1977 in response to this flyer. Ultimately, Shacket decided to purchase a new 1978 Piper Navajo from Smith, Inc. Shacket and Smith, Inc. agreed on a purchase price of $126,000 plus the trade-in of Shacket's current aircraft, the 1972 Piper Navajo. A purchase order was signed for the new Piper aircraft between Shacket and Smith, Inc. providing for an anticipated delivery date of January or February, 1978. Shacket paid Smith a $20,000 deposit with the execution of the purchase order on November 7, 1977. (R. MS Dep. 33-40, 45-46) This aircraft was to be delivered through Clark Aviation, a franchised Piper dealer. (R. MS Dep. 53-54)

In March of 1978, Shacket allowed Smith, Inc. to take his 1972 Navajo and received a loaner aircraft pending delivery of the new 1978 Piper Navajo. However, Shacket did not turn over to Smith, Inc. a bill of sale for the trade-in aircraft. Shacket suggested that the bill of sale for his trade-in airplane be placed in escrow with a bank. Roger Smith did not want to establish an escrow. It was then expressly agreed between Smith and Shacket that Shacket would hold the bills of sale for the trade-in airplane until the transaction with the new airplane was completed. When Smith delivered to Shacket the title on the new 1978 Piper Navajo, Shacket would then deliver to Roger Smith the bill of sale on the 1972 Navajo. Shacket did this in order to retain ownership of his trade-in airplane until the deal for the new Piper aircraft was completed. (R. 52, 53 [M. Shackett Affidavit, Exhibit A to Philko's Section 60(b) Motion]) Shacket never delivered the bill of sale for the 1972 Piper Navajo to Smith, Inc.

(R. MS-2 Dep. 17-23) He still retained the bill of sale on the trade-in aircraft more than two years after Smith received the trade-in aircraft. (R. 52, 53 [M. Shacket Affidavit, Exhibit A to Philko's Section 60(b) Motion])

Mr. and Mrs. Shacket flew in from Detroit, Michigan to Aurora on April 19, 1978 accompanied by their friends, Mr. and Mrs. Jack Hamburg. Upon arrival at Smith, Inc.'s office at the Aurora Municipal Airport, Shacket called Ken Rittenhouse, President of Clark Aviation, to advise him that they were closing. Rittenhouse came to Smith, Inc.'s office that same day. Roger Smith, Maurice Shacket, Kenneth Rittenhouse and Jack Hamburg then met in Smith, Inc.'s office. (R. MS-2 Dep. 36-41) Shacket asked Mr. Rittenhouse if everything was satisfactory with him and Rittenhouse said to go ahead. Rittenhouse gave Shacket *xerox copies* of the original bills of sale from Piper Aircraft Corporation to North States Aviation, from North States to Clark Aviation, and from Clark Aviation to Smith, Inc. Roger Smith gave Shacket a *purchaser's copy* of a bill of sale from Smith, Inc. to Shacket. Shacket did not ask for or receive any original bills of sale recordable with the FAA. (R. MS-2 Dep. 53-56) Shacket failed to examine the documents he received at the time he paid his money to Smith, Inc. (R. MS-2 Dep. 56-57) The first time he examined the papers he received was in mid-June of 1978. (R. MS-2 Dep. 57)

During this meeting on April 19, 1978, Roger Smith told Shacket that he was unable to complete the preparation of the bills of sale because of the demands of other work. Afterwards Shacket asked his friend, Jack Hamburg, who was returning to Detroit by a separate plane, to get the paperwork from Smith and bring it back to Detroit. Roger Smith then advised Jack Hamburg that his secretaries were too busy and couldn't finish typing

the documents. Roger Smith told Jack Hamburg that he would mail the documents to Shacket. (R. JH Dep. 44-49)

Roger Smith did not make any direct representation to Shacket that Smith would record the bills of sale with the FAA. Shacket, however, understood Roger Smith's representation that "he would take care of the paperwork" to mean that Smith would record the bills of sale. (R. MS-2 Dep. 75-76)

On or about April 20, 1978 Roger Smith represented to McArdle that Smith, Inc. had purchased a new Piper Navajo which was to be sold to a buyer in California named Krueger Aviation. Smith presented McArdle a series of original aircraft "Bills of Sale—Original to FAA," conveying title for this new aircraft from Piper Aircraft Corporation, the manufacturer, to North States Aviation Inc. (a Piper Aviation Corporation distributor for new aircraft); from North States Aviation, Inc. to Clark Aviation, Inc. (a franchised dealer for Piper aircraft); and from Clark Aviation, Inc. to Smith, Inc. plus a copy of a "Purchase Order" for the new airplane allegedly signed by Krueger Aviation. At that time Smith told McArdle that the New Piper Navajo was currently at a Piper dealer in Michigan having electronic equipment installed. (R. EM Dep. 65-66, 69; Pet. App. E 41a-44a)

Roger Smith offered to sell Philko the new aircraft in satisfaction of the remaining $60,000 obligation Smith, Inc. owed Philko and payment by Philko of an additional $152,000 cash. McArdle agreed to purchase the aircraft if a loan could be arranged from the Sandwich State Bank. McArdle arranged for Philko to borrow $152,000 from the Sandwich State Bank (Bank), in order to purchase the plane. As part of these arrangements Richard Andrews, loan officer and vice president of the Bank, was to make the loan only after he determined that

the title documentation was proper and that everything was in good order to record title to the new aircraft in Philko. (R. EM Dep. 61-64; RA Dep. 39-40)

Following its usual procedure prior to making the loan, the Bank, through Andrews, had a title search made on April 21, 1978 for the new Piper Navajo. (R. RA Dep. 109-110) The information received from this search at the Federal Aviation Administration (FAA) facility in Oklahoma City, Oklahoma was that the new 1978 Piper Navajo aircraft was as yet unregistered. The FAA records showed only that Piper Aircraft Corporation had manufactured this aircraft and that record notification had been submitted by Piper Aircraft Corporation, showing a proposed transfer to North States Aviation, Inc., a Piper distributor. (App. 7-8)

On April 22, 1978 McArdle signed the Bank's loan documents and the documents for registration of the new Piper aircraft in the name of Philko. (R. EM Dep. 64) These documents and the original bills of sale were presented to Andrews by Roger Smith. (R. EM Dep 72) It was the practice of the Bank to make aircraft loans only against the original signed documents of title because the FAA recording facility would not accept copies for filing of record. Andrews found the original signed documents and the FAA title check in order and disbursed the loan proceeds of $152,000 on April 22, 1978. (App. 9-10) That same day Andrews confirmed the transaction with McArdle by telephone. (R. EM Dep. 72) Although not expressly instructed by Philko to do so, Andrews retained the original bills of sale for approximately 30 days before commencing the recording process. Andrews did this because he expected that Philko might resell the aircraft and the FAA's usual time lapse in returning the recorded instruments might have delayed a subsequent sale. (R. RA Dep. 114, 129)

On May 25, 1978 Andrews sent the original bills of sale and Philko's application for registration to Insured Aircraft Title Service Inc. in Oklahoma City, Oklahoma with directions to file them with the FAA. (R. RA Dep. 130-135) On or about May 31, 1978 these original instruments were filed with the FAA. (Pet. App. E 41a) On June 13, 1978 the FAA recorded the bills of sale showing Philko as registered owner of the 1978 Piper Navajo N 78 MS and reflecting the security interest of the Bank for its $152,000 loan to Philko. (Pet. App. E 41a-44a)

Prior to mailing the original bills of sale, neither McArdle, Philko, nor Richard Andrews of the Sandwich State Bank, had any direct or indirect knowledge of either the existence of Maurice Shacket or any of the dealings or transactions he had with Roger Smith or Smith, Inc. It was not until after June 13, 1978 when the bills of sale had been recorded with the FAA that McArdle and Andrews were telephoned by Shacket and advised of the transaction between Shacket and Smith, Inc. (R. EM Dep. 76-78; MS-2 Dep. 98-99)

The proceeding below was a declaratory judgment action brought pursuant to 29 U.S.C. Sec. 2255 (1981) to determine title to the 1978 Piper Navajo, registered by the Federal Aviation Administration as aircraft number N 78 MS in the name of Petitioner Philko Aviation, Inc. This aircraft is and has been during the pendency of these proceedings in the possession of Respondents Maurice and Sylvia Shacket, although the aircraft has never been registered in their names. The United States District Court for the Northern District of Illinois entered summary judgment in favor of Respondents (a) finding title in the Shackets, (b) declaring that Philko had no title to the aircraft, and (c) denying Philko's claim for damages. The Court of Appeals for the Seventh Circuit affirmed the District Court's decision on June 22, 1982.

SUMMARY OF ARGUMENT

I.

Federal law and state law irreconcilably conflict concerning titles to and liens upon aircraft. Federal law requires filing with the FAA to achieve a valid interest in aircraft as against third parties without notice. Section 2-401 of the Uniform Commercial Code permits the physical transfer of possession alone to effect transfer of title in aircraft. Congress enacted a recording requirement to reflect all interests in aircraft which would promote investment in the aircraft industry. State law is preempted insofar as it interferes with this objective.

II.

The legislative history of the Federal Aviation Act reveals a clear attempt by Congress to promote the development of the aircraft industry. From 1938 to 1964, Congress amended the Federal Aviation Act and its predecessor, the Civil Aeronautics Act, by broadening the scope of the recording provisions of Section 503. In 1964, Congress added Section 506, 49 U.S.C. Sec. 1403 (1981) to provide a consistent rule for choice of law to determine the substantive validity of recorded instruments. This choice of law provision was not intended to modify in any way the recording provisions of Section 503. In enacting Section 506, Congress expressly recognized that titles to and liens upon aircraft are normally conveyed by documents alone, irrespective of the location of the aircraft.

III.

The scheme of regulation chosen by Congress shows the intent to establish a race-notice recording statute with respect to financial interests in aircraft. First, Congress legislated that no conveyance or interest in aircraft can be valid as against third parties without notice unless and until filed with the FAA. Secondly, Congress mandated the indexing of all filed instruments according to the order in which they are received for filing. These are the essential earmarks of a race-notice type of recording statute. Section 506 is intended to work in harmony with Section 503 by providing a rule for choice of law as to the substantive validity of recorded instruments. Any rule of law which permits Section 506 to effectively destroy the credibility of valid instruments of conveyance or other valid instruments recorded in accordance with Section 503 frustrates the Congressional intent of the Federal Aviation Act.

IV.

By viewing Section 503 as essentially a race-notice recording statute, most if not all of the recurring disputes concerning financial interests in aircraft can be consistently and predictably resolved in a manner which promotes Congressional intent. In analyzing various assumed fact situations, according priority in right to the first to record encourages the reliance upon and use of the FAA central registry. The judicial interpretation of Section 506 should be confined to the determination of the validity of an instrument and should not be expanded in its scope to include substantive law the effect of which is to annul recorded security interests without notice or allow transfer of title by possession. Interpreted in this fashion, the provisions of Sections 503 and 506 are entirely practicable in the fact situations in which the majority of disputes arise.

ARGUMENT

I.

THERE EXISTS AN IRRECONCILABLE CONFLICT BETWEEN THE RECORDING PROVISIONS OF THE FEDERAL AVIATION ACT AND STATE SALES LAW.

In determining whether and to what extent the recording provisions of the Federal Aviation Act preempt state law, the initial inquiry is whether there exists an irreconcilable conflict between state and federal law. *Rice, Director of Department of Alcoholic Beverage Control of California v. Norman Williams Co., et al.*, ... U.S. ....., 102 S. Ct. 3294 (1982). The instant case presents just such a conflict. Section 503(c), 49 U.S.C. Sec. 1403(c) (1981) provides that a conveyance shall not be valid with respect to third parties without notice unless and until it is filed for recordation with the Federal Aviation Administration (FAA). Section 2-401 of the Uniform Commercial Code, Ill. Rev. Stat. Ch. 26, Sec. 2-401 (1978) provides that title to goods may pass in any manner agreed upon by the parties, but unless otherwise agreed, title passes when the seller completes his performance with respect to physical delivery of the goods, even though a document of title is to be delivered at a different time or place. Under Section 503(c), Smith, Inc.'s conveyance of the new Piper Navajo aircraft to Philko is valid because Philko obtained the original bills of sale, verified the status of title and duly recorded with the FAA Central Registry. (Pet. App. E 41a-44a) Philko, however, never received physical possession of the new Pipe Navajo aircraft because Smith had represented to McArdle that the plane was in Michigan at a Piper dealer for the installation of electronic equipment. Under Section 503(c) Smith, Inc.'s purported conveyance of the new

Piper Navajo aircraft to the Shackets can have no validity as to third parties without notice because the Shackets failed to obtain instruments of conveyance and failed to record. Nevertheless under state law, Section 2-401, Shacket could have a valid conveyance upon the receipt of physical possession of the aircraft. The record conclusively shows that Philko, however, had no notice of the Shackets' purported transaction until after it paid for the plane and filed the bills of sale with the FAA.

Even though Congress has not completely displaced state regulation in a particular field, state law is preempted insofar as it stands as an obstacle to the achievement of the objectives and purposes of Congress in that field. *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, ... U.S. ....., 102 S. Ct. 3014 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The purpose of Congress as discerned by the Court is the ultimate touchstone. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). In Title V of the Federal Aviation Act, Congress has unequivocally legislated two requirements with respect to aircraft conveyances: (a) the necessity to record each and all conveyances; and (b) the place of recording. One of Congress' primary purposes was to provide stability in the realm of aircraft titles. Stability in this area encourages the investment of capital because those who purchase, finance purchases or otherwise invest in aircraft can be certain of the legal status of their interest. Maintaining the flow of capital to the air transportation industry promotes the modernization and maintenance of aircraft. The intent of Congress in enacting Title V of the Federal Aviation Act is evident from the legislative history and from the scheme of regulation contained in this section of the Act.

II.

THE LEGISLATIVE HISTORY OF SECTIONS 503 AND 506 DEMONSTRATES THAT CONGRESS INTENDED TO EFFECTUATE THE STATUTORY SYSTEM FOR MANDATORY RECORDING OF INSTRUMENTS AFFECTING AIRCRAFT TITLES BY NULLIFYING UNRECORDED CONVEYANCES AS AGAINST PARTIES WHO, WITHOUT NOTICE, RELY UPON THE FAA CENTRAL REGISTRY.

Prior to the enactment of the Civil Aeronautics Act of 1938 (hereinafter CAA), the air transportation industry was regulated by no less than three separate agencies of the federal government. In addition, certain executive departments of government were also involved in the development of airways and air navigation facilities. Congress deemed it vital for the development of the aeronautics industry to implement a single cohesive body of regulation administered by a single agency of government. H.R. Rep. No. 2254, 75th Cong., 3d Sess. 1-5 (1938). In addition to establishing a single regulatory agency of the federal government, the 1938 Act had three broad objectives: (a) to foster the development of civil aeronautics; (b) to regulate the economic aspects of public air carriers in order to prevent destructive competition and wasteful duplication of resources; and (c) to insure minimum safety standards with respect to all air transportation, public and private. Congress had previously enacted the Air Commerce Act of 1926, 44 Stat. 572 (1926), which established a policy of regulating the design, manufacture and operation of aircraft flying in interstate commerce, prescribing qualifications for airmen and promulgating air traffic rules. The 1938 Act was intended to continue this safety regulation and entrust it to the newly formed agency. H.R. Rep. No. 2254, 75th Cong., 3d Sess. 4 (1938).

The Air Commerce Act of 1926, 44 Stat. 572 (1926), predecessor to the CAA, contained no regulatory pro-

visions with respect to aircraft title interests. The Air Commerce Act only contained a permissive registration section, which provided:

> (a) Registration of aircraft.—Provide for the granting of registration to aircraft eligible for registration, if the owner requests such registration. No aircraft shall be eligible for registration (1) unless it is a civil aircraft owned by a citizen of the United States and not registered under the laws of any foreign country, or (2) unless it is a public aircraft of the Federal Government, or of a State, Territory, or possession, or of a political subdivision thereof. All aircraft registered under this subdivision shall be known as aircraft of the United States.

Air Commerce Act of 1926, Sec. 173, 44 Stat. 572. The CAA implemented the first regulation of aircraft with respect to nationality and ownership. In 1938, therefore, Congress made a conscious determination that the Air Commerce Act was insufficient to meet the needs of the aircraft industry. With respect to nationality and ownership of aircraft the CAA mandated registration of aircraft and recordation of conveyances affecting aircraft. Specifically with respect to recordation of conveyances affecting title to aircraft, the Civil Aeronautics Act of 1938, 52 Stat. 973, provided:

> Establishment of Recording System
>
> SEC. 503. (a) The Authority shall establish and maintain a system for recording all conveyances affecting the title to, or interest in, any civil aircraft of the United States.
>
> Conveyances To Be Recorded
>
> (b) No conveyance made or given on or after the effective date of this section, which affects the title to, or interest in, any civil aircraft of the United States, or any portion thereof, shall be valid in respect of such aircraft or portion thereof against

> any person other than the person by whom the conveyance is made or given, his heir or devisee, and any person having actual notice thereof, until such conveyance is recorded in the office of the secretary of the Authority. Every such conveyance so recorded in the office of the secretary of the Authority shall be valid as to all persons without further recordation. Any instrument, recordation of which is required by the provisions of this section, shall take effect from the date of its recordation, and not from the date of its execution.

Although the Senate or House Committee Reports pertaining to the 1938 Act do not expressly state why Congress felt it necessary to enact mandatory registration and recording provisions, it is reasonable to infer that the registration and recording requirement had as its purpose to aid the Civil Aeronautics Authority in carrying out at least two of the three statutory objectives: fostering civil aeronautics and effectuating the safety standards imposed by the Act. Certainty of the legal status of aircraft titles creates an environment where capital may be safely invested, thereby promoting the growth of the industry. Recordation of all ownership interests in aircraft enables the agency to monitor aircraft safety standards on a continuing basis, and provides a means to notify aircraft owners of airworthiness requirements pertaining to their respective aircraft.

In 1948 Congress amended Section 503 of the Civil Aeronautics Act of 1938. The amendment provided a system for the recordation of liens on large aircraft engines and on spare parts used by air carriers. This amendment was intended to facilitate financing of new aircraft. Purchasers of new aircraft, especially commercial aircraft, normally buy spare engines and spare parts. Because the 1938 Act did not provide for recording liens on engines or spare parts alone, these items were ex-

tremely difficult to finance. As a result, this retarded the purchase of new, more efficient aircraft by air carriers. S. Rep. No. 1362, 80th Cong., 2d Sess. 1-2 (1948).

Section 503 was rewritten in this 1948 Amendment. Section 503(b) of the 1938 Act which contained the mandatory recording provision became 503(c). Section 503(c), as revised in 1948, 62 Stat. 494 (1948) provided:

> (c) No conveyance the recording of which is provided for by section 503(a) (1) made on or after August 22, 1938, and no instrument the recording of which is provided for by section 503(a) (2) or section 503(a) (3) made on or after the effective date of this section, shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator. For the purposes of this subsection (c), such conveyance or other instrument shall take effect from the time and date of its filing for recordation, and not from the time and date of its execution.

Under Section 503(b) of the 1938 Act, CAA instruments affecting aircraft titles took effect as to third parties without notice on the date of recording, not the date of filing or execution. Under the 1948 revision, as to third parties without notice, conveyances were effective upon the date of filing for recordation. This amendment demonstrates the continued legislative intent to maintain a current and reliable central registry of all financial interests in civil aircraft. The nullification of unrecorded conveyances as against unsuspecting parties who rely upon the central registry in dealing with the purchase or financing of civil aircraft or aircraft parts creates a

stable commercial environment for the investment of capital in the air transportation industry.

With respect to Section 503(c) the Senate Committee on Interstate and Foreign Commerce stated:

> Subsection 503(c) provides that a conveyance or instrument which could be recorded as provided in section 503(a) shall be invalid with respect to third persons without notice unless recorded as provided in the bill. This extends the rule now in effect with respect to conveyances affecting title to, or interest in, aircraft to the instruments recordable under the new legislation. The last sentence provides that for the purpose of giving notice to third persons, the instrument shall be effective from the date of its filing for recordation. This leaves the instrument valid for all other purposes from the date of its execution.

S. Rep. No. 1362, 80th Cong., 2d Sess. 3 (1948).

Another amendment to the CAA passed in 1948 further reveals the legislative intent to create a stable commercial and financial environment to encourage the continuing flow of investment capital into this industry. In 1948, Congress added Section 504 which prevents pure lenders from becoming liable for damages caused by airplane crashes. Section 504 provided:

> SEC. 504. No person having a security interest in, or security title to, any civil aircraft under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, or by the ascent, descent, or flight of such aircraft or by the dropping or falling of an object therefrom, unless

such aircraft is in the actual possession or control of such person at the time of such injury, death, damage, or loss.

When Congress enacted the Federal Aviation Act of 1958, the registration and recording provisions were reenacted without change. 2 U.S. Code Cong. & Ad. News 3755 (1958); S. Rep. No. 1060, 88th Cong., 2d Sess. 2 (1964).

Congress next amended Section 503 of the FAA in 1959 to permit recordation of liens on individual propellers. This was done to facilitate modernization of commercial air fleets. Prior to this amendment, liens could be recorded on aircraft propellers only if they were in a definitely located stockpile under so-called "basket mortgages." In conjunction with this amendment, lenders who financed purchases of propellers were also accorded the protection against liability from airplane crashes contained in Section 504. This 1959 amendment expressed Congress' purpose to insure the flow of capital to the aircraft industry by providing further stability in financing with respect to modernization of aircraft. H.R. Rep. 445, 86th Cong., 1st Sess. 1 (1959). The fact that the recording provisions of Section 503 were expanded in 1959 demonstrates that Congress deemed state law with respect to the necessity and the place of recording inadequate to meet the needs of the industry.

Finally, Congress amended the registration and recording sections of the Federal Aviation Act in 1964 by adding Section 506, 49 U.S.C. Sec. 1406 (1981). The specific problem which this amendment addressed was the difficulty in determining the substantive law governing the validity of recorded instruments affecting aircraft titles and security interests. Section 506 therefore provided a federal rule for the choice of law relating to the substantive validity of instruments of conveyance. Senate Report

1060 expressly noted the importance of the federal recording system and reflects the intention that Section 506 was to operate in conjunction with the existing recording system not against it:

* * *

> The rule would apply to all instruments subject to the recording provisions of section 503 of the Federal Aviation Act. Included would be various instruments executed for security pruposes [sic] such as conveyances, leases, mortgages, equipment trusts, conditional sales contracts, etc. Assignments, amendments, and supplements to such instruments would similarly be covered. To determine the validity of such an instrument, one would need only to look to the substantive law of the particulr [sic] State in which the relevant instrument was delivered.
>
> The fact that the determination of the validity of aircraft conveyances involved extremely cumbersome and complex procedures was recognized by the Congress when it originally enacted the Civil Aeronautics Act of 1938. That act contained a provision which provided for the establishment of a central national recording system for all instruments affecting title to or interest in civil aircraft of this country. This provision was incorporated in section 503 of the Federal Aviation Act of 1958 substantially without change. *It continued the previously established recording system and provides that no conveyance or instrument affecting aircraft shall be valid until filed for recordation except as to parties to the instrument or persons with actual notice of its existence.* When the instrument has been filed for recordation under the law, all persons are deemed to have notice of its existence and its effect on title to the property covered thereby. *Consequently, to determine whether there are any encumbrances on the aircraft, it is only necessary to consult the central file.* [Emphasis added.] * * *

S. Rep. No. 1060, 88th Cong., 2d Sess. 2 (1964).

In enacting Section 506, Congress acknowledged that state law controlled on questions of the substantive validity of instruments. However, given Congress' continued recognition of the importance of the central nationwide recording system for aircraft, it is evident that Congress intended to preempt state law in two respects: (1) that an instrument, otherwise valid under state law, affecting an aircraft title, must be filed for recording in order to achieve validity as against third parties without notice; and (2) that the filing be done at the FAA Central Registry. As against third parties without notice, any state's substantive law which permits an interest in aircraft to be created without filing with the FAA, conflicts with the intent of the Congress as reflected in the legislative history of the FAA and is contrary to the express statutory language. With respect to the purchase of an aircraft, the transfer of physical possession alone is insufficient to convey valid title to the purchaser as to third parties without notice. With respect to any person creating a lien upon aircraft, local filing or possession (e.g., a possessory mechanic's lien) is insufficient to create an interest valid as to third parties without notice.

Section 506 expressly states that the validity of an instrument is to be determined by the law of the state of delivery of the *instrument, "irrespective of the location* or the place of delivery *of the property* which is the subject of such instrument." 49 U.S.C. Sec. 1406 (1981) [Emphasis added]. Congress therefore expressly recognized that conveyances of aircraft as well as financing of aircraft were normally accomplished by delivery of instruments notwithstanding the fact that the location of the aircraft is undetermined or undeterminable:

> While existing law has assisted materially in facilitating the determination as to the validity of instruments, it does not establish the substantive

validity of the instrument as proposed by this measure. Considerable doubt and confusion still exist in this field. The laws of the various States differ quite substantially with respect to the validity of various instruments. In attempting to resolve the issue as to which jurisdiction's laws should apply in determining such an instrument's validity, it is arguable that the law of one of three of the following jurisdictions is applicable: The jurisdiction in which the property is located; the jurisdiction in which the parties reside; or the jurisdiction in which the instrument was executed and delivered. As an example of the needless complexities and difficulties in making such a determination, suppose an airline desired to refinance its fleet of aircraft: each of the three rules governing jurisdiction would have to be covered. With respect to the first, for example, it would be necessary to know the exact location of every aircraft at the precise moment the refinancing instrument was executed. Pinpointing the exact location of aircraft, many of which today fly at speeds well in excess of 500 miles an hour, is extremely difficult and at times impossible. Such unnecessary and costly procedures which one must now go through to determine the validity of aircraft instruments would be remedied by this legislation. The bill selects, and the committee is convinced, most logically, the place where the instrument is delivered. Consequently, the prospective purchaser would not only be able to readily ascertain whether encumbrances are recorded against an aircraft but would in addition be in the position to assess the validity of any instruments affecting the aircraft's title by simply consulting the law of the place where the instruments were delivered.

* * *

S. Rep. No. 1060, 88th Cong., 2d Sess. 2 (1964).

Nowhere in the Congressional record is there any indication that by enacting Section 506 Congress intended

to alter in any way Section 503. Congress left intact the mandate of Section 503(a) for the establishment and maintenance of a system for recording "each and all conveyances, leases, mortgages, equipment trusts, contracts of conditional sale or other instruments executed for security purposes." Congress also left unchanged Section 503(c) which clearly precludes the creation of a valid interest in an aircraft as against third parties without notice by the physical transfer of possession alone. It therefore follows that as between two parties acting in good faith and who have no notice of one another's transaction with respect to a single aircraft, the party who received delivery of validly executed instruments of conveyance must prevail upon the filing of these instruments with the FAA's central registry. In the context of this manifest Congressional intent and statutory language, the criteria for the determination of the substantive validity of an instrument under state law does not include delivery or possession of the aircraft, notwithstanding state law to the contrary. Resort to state law for the determination of the validity of an instrument as provided by Section 506 is both reasonable and necessary in view of the lack of Federal substantive law. Thus Section 506 provides a Federal rule for the choice of law regarding substantive validity of instruments. The act and the Congressional intent clearly preclude the operation of state law except as to the determination of validity of an instrument recorded under the act. To hold otherwise would permit the conveyance of aircraft without documentation and frustrate the operation of Section 503.

III.

IN SECTION 503 CONGRESS HAS CHOSEN A RECORDING SYSTEM AS THE MEANS OF RESOLVING DISPUTES OVER CONFLICTING INTERESTS IN AIRCRAFT. ANY STATE LAW WHICH EMPLOYS A DIFFERENT SYSTEM IS SUPERSEDED.

One of the earmarks of Congressional intent is the scheme of the federal regulation itself. The scheme of federal regulation may be so pervasive or so dominant in a particular field that enforcement of state law on the same subject is precluded. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946).

Since 1938 it has been the law that every aircraft owner must register with the FAA before flying the aircraft. 49 U.S.C., Sec. 1401 (1981). It is unlawful to fly an unregistered aircraft and the penalty for the failure to do so can be as high as $1,000 per day. 49 U.S.C., Sec. 1471 (1981). Determination of the procedures for registration of aircraft was delegated by Congress to the Administrator of the Federal Aviation Administration, now the Secretary of Transportation. Accordingly, Congress provided that the registration of aircraft is not determinative of ownership in any proceeding in which ownership by a particular person was in issue. 49 U.S.C., Sec. 1401(f) (1981). This implies that the Federal Aviation Administration is not a judicial arbiter as to who is rightful owner of an aircraft. Nevertheless, this does not mean that Congress considered recording a permissive or ineffective act. Section 503 imposes a duty on the Administrator to maintain a central index of conveyances which is a duty separate and distinct from the registration of aircraft. Section 503(f), 49 U.S.C., Sec. 1403(f) (1981), mandates that the Administrator maintain a record of the time and date of the filing of conveyances and other instruments with him and of the time and date

of recordation thereof. Instruments and conveyances must be filed in the order of their reception and indexed according to:

> (1) the identifying description of the aircraft, aircraft engine, or propeller, or in the case of an instrument referred to in section 503(a)(3) [subsec. (a)(3) of this section], the location or locations specified therein; and
>
> (2) the names of the parties to the conveyance or other instrument.

49 U.S.C., Sec. 1403(f) (1981).

Considering the provision of Section 503(c) that conveyances cannot be valid as to third parties without filing for record together with Section 503(f) requiring the Administrator to record the time of filing and to index instruments by aircraft and names of the parties, it is submitted that Congress was legislating a "race-notice" type of statute with respect to aircraft titles and encumbrances.

Recording statutes in the law of real estate are intended to protect real estate transactions from conflicting claims. They are considered to have a dual purpose: first, to protect the rights of innocent purchasers who acquire an interest in property without knowledge of prior encumbrances; and secondly, to establish a public record which would furnish potential purchasers with notice of previous conveyances and encumbrances that might affect their interests. 6A, Powell, R., *The Law of Real Property*, Sec. 904 (1981). When real estate law evolved to the point where deeds of conveyance were used, title transfers and encumbrances were effectuated by delivery and recording of instruments rather than by actual transfers of physical possession or symbolic physical transfers, such as livery of seisin. 8 Thompson, G.W.,

Commentaries on the Modern Law of Real Property, Sec. 4220 (1981).

At common law, the theory of "first in time, first in right" prevailed and in a dispute between two grantees from the same grantor, the earliest dated deed prevailed. Recording statutes adopted by virtually all states have now displaced this rule. *Id.* at Sec. 4420. In a dispute between two grantees from the same grantor, the outcome is determined by the type of recording statute used. In general, there are three variations in recording statutes:

(1) "Race"—giving priority to the first transferee to record;

(2) "notice"—giving priority to the transferee who acquires an interest without notice of a prior transfer; and

(3) "race-notice"—giving priority to the transferee who acquires an interest without notice of a prior transfer only if that subsequent transferee is first to record.

6A Powell, R., *The Law of Real Property*, Sec. 905 (1981).

Section 503 as it is presently written is a recording statute which bears the essential earmarks of a "race-notice" statute. Insofar as Section 503(c) holds unfiled conveyances invalid as to third parties without actual notice, it contains the key attribute of a pure notice statute. 6A, Powell, R., *The Law of Real Property*, Sec. 905[1](b) (1981). Under Section 503(c) a prior transferee and a subsequent transferee can both be third parties without notice vis-a-vis one another. As between those two, the subsequent transferee will have a valid conveyance only if he files for recordation because under Section 503(d), 49 U.S.C. § 1403(d) (1981), a subsequent transferee's conveyance becomes valid as to all third parties without notice only upon filing. The fact that Congress required the Administrator to keep a record of the

time and date of filing implies that priority in time of filing affects the determination of priorities of competing interests. Section 503 is therefore in substance a race-notice statute.

Under any recording statute, questions of substantive validity of instruments arise. Issues such as delivery, fraudulent procurement, forgeries, or errors in deeds concern substantive validity of the instrument. In real estate law, these issues are normally resolved under common law principles. Because of the highly mobile nature of aircraft, a threshold problem is created in determining substantive validity of instruments, viz. which state's common law applies? This is a question non-existent in real estate conveyancing. It is the sole problem which Section 506, 49 U.S.C., Sec. 1406 (1981) addresses.

IV.

THE USE OF A RECORDING SYSTEM RATHER THAN TRANSFER OF PHYSICAL POSSESSION AS THE MEANS OF RESOLVING AIRCRAFT TITLE DISPUTES PROVIDES A CONSISTENT AND PRACTICAL MEANS OF DECIDING RECURRING TITLE PROBLEMS AND A PREDICTABLE RULE FOR FUTURE PROBLEMS.

A review of previously decided cases indicates that with respect to aircraft titles and encumbrances, four types of conflicts occur on a continuing basis: (a) a dealer sells an aircraft to a buyer in the ordinary course of business, but fails to remit the proceeds to the floor-plan lender who has previously recorded his security interest with the FAA, *e.g. Texas National Bank v. Aufderheide*, 235 F. Supp. 599 (E.D. Ark. 1964); (b) a mechanic who repairs an aircraft asserts a lien but records in accordance with state law, not with the FAA, *e.g. Crescent City Aviation v. Beverly Bank*, 219 N.S.2d 446 (1966); (c) two purchasers buy the same aircraft from the same seller,

Blalock v. Brown, 51 S.E.2d 610 (1949); and (d) a lender extends credit on an aircraft which was the subject of a prior unrecorded transaction, *e.g. Marsden v. Southern Flight Services*, 227 F. Supp. 411 (M.D.N.C. 1961). By employing the principles normally used to resolve title disputes under a race-notice recording statute these fact situations can be resolved consistently and predictably. Consistency and predictability will achieve the Congressional purpose of stability in aircraft financing.

A. Because Of The High Unit Cost Of Aircraft And Aircraft Parts A Prior Recorded Secured Creditor Should Prevail As Against Buyer In The Ordinary Course Of Business.

Much of the litigation arising under Section 506, 49 U.S.C., Sec. 1406 (1981), concerns the validity of a prior recorded security interest in an aircraft that is entrusted to a merchant dealing in aircraft, who sells the secured aircraft to a buyer in the ordinary course. In many cases, though not all, a buyer in the ordinary course has prevailed over a previously recorded security interest. Cases involving this question include: *Gary Aircraft Corp. v. General Dynamics Corp.*, 681 F.2d 365 (5th Cir. 1982); *Sanders v. M. D. Aircraft Sales, Inc.*, 575 F.2d 1086 (3rd Cir. 1978); *Haynes v. General Electric Credit Corp.*, 432 F. Supp. 763 (D.C. Va. 1977); *Northern Illinois v. Bishop Distributing*, 284 F. Supp. 121 (D.C. Mich. 1968); *U.S. Aviation Underwriters, Inc. v. WTAE Flying Club*, 300 F. Supp. 341, 348 (D.C. Pa. 1969); *Bitzer-Croft Motors v. Pioneer Bank & Trust*, 82 Ill. App. 3d 1, 401 N.E.2d 1340 (1980). In these cases, the courts have opted in favor of the policy contained in Section 9-307, Ill. Rev. Stat. Ch. 26, Sec. 9-307 (1978) that a buyer in the ordinary course of business has the right to assume that the merchant can sell the commodity being purchased and that the buyer should not be required to make a record search

before purchasing or verify that the merchant obtains a valid release of the item from a bank floor plan or security interest. See *Texas National Bank v. Aufderheide*, 235 F. Supp. 599 (E.D. Ark. 1964); and *State Securities Co. v. Aviation Enterprises*, 355 F.2d 225 (10th Cir. 1966).

Cases which reject the policy of 9-307 include *Dowell v. Beech Acceptance Corp.*, 91 Cal. Rptr. 1, 476 P.2d 401 (1971); *O'Neill v. Barnett Bank of Jacksonville, N.A.*, 360 So. 2d 150 (1978); *Pope v. National Aero Finance Co.*, 236 Cal. App. 2d 722, 46 Cal. Rptr. 233 (1965); and *Dawson v. General Discount Corp.*, 82 Ga. App. 39, 60 S.E.2d 653 (1950).

A major purpose of Section 503 is to promote the civil aircraft industry by creating a stable financial environment to attract investment in aircraft. The purpose of Section 9-307 is to promote retail commerce by insuring the free alienability of retail goods. Because Congress had decided that commerce is best promoted in the civil aircraft industry by employing a recording system, it is submitted that the protection provided to a buyer in the ordinary course under Section 9-307 is neither desirable nor necessary for an aircraft purchaser, lender or investor. Given the high unit cost of aircraft and the relative infrequency of aircraft purchases as compared to normal consumer goods, commerce in this field is best promoted by giving lenders, purchasers and sellers a precise way of determining with certainty the legal status of their interests.

Requiring the aircraft purchaser to get a release of all prior liens is not a substantial burden if a reliable index is available. In the case now before this court the Respondent, Maurice Shacket, testified that he was aware of the registration requirement pertaining to aircraft. He himself prepared a bill of sale and a registration form in

connection with the sale of his 1972 Pipe Aztec in 1975. (R. MS-2 Dep. 20-25) In his transaction with Smith, Inc. in 1978 he stated under oath that he was withholding the bill of sale to his trade-in aircraft until he received title to the new 1978 Piper Navajo. (R. MS-2 Dep. 17-23; R. 52, 53 [M. Shacket Affidavit Exhibit A to Philko's Section 60(b) Motion]) If Mr. Shacket had demanded the original bills of sale on April 19, 1978 instead of ignoring the documents he received, Roger Smith would not have been able to use these instruments to defraud anyone. Under the current state of the law, lenders are understandably reluctant to engage in aircraft financing when the FAA Central Registry can be used as a means of aiding in the commission of a fraud. It is submitted that this is not the type of environment which Congress contemplated when enacting Sections 503 or 506.

B. Mechanic's Liens On Aircraft Should Not Be Valid As To Third Parties Without Notice Unless Recorded.

Most states have statutes which give a person who repairs personal property, including aircraft, a lien for the labor and materials supplied. *See, e.g.*, 42 Okla. Stat. Sec. 97 (1971). In some states, the lien is a possessory lien only. *See*, Ill. Rev. Stat. Ch. 82, Sec. 47(a) (1982). In other states the artisan can perfect his lien by recording in accordance with local state law. Most lower courts have held that an artisan's lien under state law can have no validity as to third parties without notice. One typical case is *Crescent City Aviation v. Beverly Bank*, 219 N.E.2d 446 (1966). In *Crescent City, id.*, a mechanic's lien claimant made repairs to an aircraft in Indiana pursuant to a contract with the aircraft's owner and filed his claim for lien with the local recorder as provided by Indiana law. His lien was found to be null and void as against a prior secured creditor who recorded with the FAA. Holding

that the federal recording statute pre-empted state lien law the Court stated:

> The validity of this lien or of any conveyance within the purview of the FAA is a question to be determined by applying the law of the jurisdiction where the instrument is delivered. *But there is no question of validity or for [sic] construction of the instrument that can be determined until the lien is filed under the Federal Act.* [Emphasis added].

Id. at 449.

Of like effect are: *Holliday Airlines Corp. v. Pacific Propeller, Inc.*, 620 F.2d 731 (9th Cir. 1980) where the lien claimant who recorded with the FAA against an aircraft of Holliday Airlines Corp. prevailed over Holliday's trustee in bankruptcy; and *McCormack v. Air Center Inc.*, 571 P.2d 835 (Okla. S. Ct. 1977) in which a federally recorded claim for lien was found to be enforceable against a subsequent federally recorded purchaser.

In resolving disputes concerning mechanic's liens Section 503(c) mandates the necessity and place of recording. Once recorded, a mechanic's lien will be valid as against third parties if under state law the mechanic has otherwise complied with local law (e.g., recorded his lien in a timely manner; complied with local law as to the statements required to be made in the lien claim.

C. Between Competing Purchasers Of The Same Aircraft The First To Record Should Prevail.

If two parties acting in good faith purchase the same aircraft from the same seller, three possibilities may be presented: (1) one of the purchasers fails to obtain the necessary bills of sale, as in the case now before the Court; (b) both purchasers receive bills of sale; or (c) neither party receives bills of sale. In the first situation,

since only one party receives the bills of sale his conveyance becomes valid as against the other upon filing with the FAA. In the second situation, both parties are entitled to file their bills of sale. Most likely, one set of those bills of sale will be authentic and one will be forged. The substantive validity of the documents can be determined under the state law as provided under Section 506. Under the relevant state laws, the party with the valid bills of sale will prevail. If both parties have bills of sale which are valid under the applicable state law, the first to record should prevail, as in *Blalock v. Brown*, 51 S.E.2d 610 (1949). In the third situation where neither party has the required instruments for recording, they would remain at risk until they were able to file some valid instrument with the FAA. However, there appears to be no restriction against filing some form of unilateral declaration of ownership which should provide notice to all third parties of the purchaser's claimed interest in the subject aircraft. The validity of this or any other interest will ultimately have to be resolved by resort to state court as provided by Section 506. Because of the highly mobile nature of aircraft, in any of the above fact situations recording is a far more reliable indicia of title than possession.

D. A Lender Who Extends Credit On An Aircraft Which Has Been The Subject Of A Prior Unrecorded Conveyance Should Be Treated As A Subsequent Good Faith Purchaser.

A lender typically extends credit for aircraft purchases on the strength of original bills of sale and the facts shown at the FAA Central Registry. See Deposition of Richard Andrews (App. 6-7). Where the pledged aircraft has been the subject of a prior unrecorded sale, the lender is in the same position as a competing purchaser

from the same seller, discussed in C above. This was the issue presented in *Marsden v. Southern Flight Service*, 227 F. Supp. 411 (M.D.N.C. 1961). In this case, the District Court resolved the dispute in favor of the lender because the prior purchaser failed to record. The Court stated at 227 F. Supp. 419:

> And in fact, the equities of the case, if not the hardship, are not altogether with the plaintiff. The burden of recording the bill of sale rested on the purchaser-plaintiff. His failure to cause it to be recorded promptly caused the loss in question. He operated the plane for more than eight months without the registration certificate but was never suspicious of his failure to receive it. In flying the aircraft without having obtained a certificate of registration in this period of time, the plaintiff may have been in violation of 49 U.S.C.A. Sec. 1401.

The court therefore treated the lender as a good faith purchaser without notice. This is consistent with the Uniform Commercial Code, Ill. Rev. Stat., Ch. 26, Sec. 1-101 *et seq.* (1978). Section 1-201(33) defines "purchaser" as one who takes by purchase. Section 1-201(32) defines purchase to include taking "by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property." In the present controversy, the trial court viewed Philko's transaction as a credit transaction rather than a purchase. Assuming, *arguendo* that Philko was a lender in its transaction, Philko nevertheless should prevail because it was, under state law, a good faith purchaser without notice of Smith, Inc.'s purported conveyance to Shacket.

CONCLUSION

The objectives of Congress in enacting Title V of the Federal Aviation Act, 49 U.S.C. Sec. 1401 *et seq.* (1981) can only be achieved if the recording system contained in Section 503(c) is enforced. Parties who fail to file or record their conveyances must not be allowed to prevail against those who rely upon the FAA Central Registry in purchasing or financing aircraft. Enforcing Section 503(c) by nullifying unrecorded conveyances as against third parties without notice will allow the ready determination of each and all interests in aircraft, and promote rather than discourage financial transactions in aircraft and their component parts. In addition, it will better enable the Administrator to monitor the airworthiness of all civil aircraft by creating a reliable index of aircraft owners. For these reasons, Petitioner Philko Aviation, Inc. urges this Court: (a) to reverse the decision of the District Court and Court of Appeals below; (b) to enter a declaratory judgment order pursuant to 29 U.S.C. Sec. 2255 (1982) declaring Philko Aviation, Inc. as the rightful owner of the 1978 Piper Navajo Aircraft registered in Philko's name as number N 78 MS; (c) to remand this case for a determination of the amount of damages to which Philko is entitled for the loss of use of the 1978 Piper Navajo aircraft during the pendency of these proceedings; and (d) to grant such other relief in aid of the foregoing as this Court may deem just.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI

Article VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

49 U.S.C. Sec. 1403 (1981)

§ 1403. Recordation of aircraft ownership

(a) Establishment of recording system. The Administrator [Secretary of Transportation] shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;

(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff shaft horsepower, and also any assignment or amendment thereof or supplement thereto;

(3) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 604(b) of this Act [49 USCS § 1424(b)] for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof; and also any assignment or amendment thereof or supplement thereto;

(b) Recording of releases, cancellations, discharges, or satisfactions. The Administrator [Secretary of Transportation] shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

(c) Validity of conveyances or other instruments, filing. No conveyance or instrument the recording of which is provided for by section 503(a) [subsec. (a) of this section] shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator [Secretary of Transportation]: Provided, That previous recording of any conveyance or instrument with the Administrator of the Civil Aeronautics Administration under the provisions of the Civil Aeronautics Act of 1938 shall have the same force and effect as though recorded as provided herein; and conveyances, the recording of which is provided for by section 503(a)(1) [subsec. (a)(1) of this section] made on or before August 21, 1938, and instruments, the recording of which is provided for by sections 503(a)(2) and 503(a)(3) [subsecs. (a)(2) and (a)(3) of this

section] made on or before June 19, 1948, shall not be subject to the provisions of this subsection.

(d) Effect of recording. Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, except that an instrument recorded pursuant to section 503(a)(3) [subsec. (a)(3) of this section] shall be effective only with respect to those of such items which may from time to time be situated at the designated location or locations and only while so situated: Provided, That an instrument recorded under section 503(a)(2) [subsec. (a)(2) of this section] shall not be affected as to the engine or engines, or propeller or propellers, specifically identified therein, by any instrument theretofore or thereafter recorded pursuant to section 503(a)(3) [subsec. (a)(3) of this section].

(e) Form of conveyances or other instruments. Except as the Administrator [Secretary of Transportation] may by regulation prescribe, no conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

(f) Index of conveyances and other instruments. The Administrator [Secretary of Transportation] shall keep a record of the time and date of the filing of conveyances and other instruments with him and of the time and date of recordation thereof. He shall record conveyances and other instruments filed with him in the order of their reception, in files to be kept for that purpose, and indexed according to—

(1) the identifying description of the aircraft, aircraft engine, or propeller, or in the case of an instrument referred to in section 503(a)(3) [subsec. (a)(3) of this section], the location or locations specified therein; and

(2) the names of the parties to the conveyance or other instrument.

(g) Regulations. The Administrator [Secretary of Transportation] is authorized to provide by regulation for the endorsement upon certificates of registration, or aircraft certificates, of information with respect to the ownership of the aircraft for which each certificate is issued, the recording of discharges and satisfactions of recorded instruments, and other transactions affecting title to or interest in aircraft, aircraft engines, propellers, appliances, or parts, and for such other records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties dealing with Civil aircraft of the United States, aircraft engines, propellers, appliances, or parts.

(h) Previously unrecorded ownership of aircraft. The person applying for the issuance or renewal of an airworthiness certificate for an aircraft with respect to which there has been no recordation of ownership as provided in this section shall present with his application such information with respect to the ownership of the aircraft as the Administrator [Secretary of Transportation] shall deem necessary to show the persons who are holders of property interests in such aircraft and the nature and extent of such interests.

49 U.S.C. Sec. 1406 (1981)

§ 1406. Law governing validity of certain instruments

The validity of any instrument the recording of which is provided for by section 503 of this Act [49 USCS § 1403] shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

Ill. Rev. Stat. Ch. 26, Sec. 2-401 (1978)

§ 2-401. Passing of Title; Reservation for Security; Limited Application of this Section

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; and

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale". 1961, July 31, Laws 1961, p. 2101, § 2-401.

Ill. Rev. Stat. Ch. 26, Sec. 2-403 (1978)

§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7). 1961, July 31, Laws 1961, p. 2101, § 2-403.